

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD KELLY, CM-8417,)	
Petitioner,)	
)	
v.)	Civil Action No. 08-1388
)	
WARDEN LOCKETT, et al.,)	

Report and Recommendation

I. Recommendation:

It is respectfully recommended that the petition of Richard Kelly for a writ of habeas corpus be transferred to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1631.

II. Report:

Richard Kelly has presented a petition for a writ of habeas corpus which he seeks leave to prosecute in forma pauperis.

Kelly is presently incarcerated at the State Correctional Institution at Greensburg serving a life sentence imposed following his conviction of first degree murder on May 27, 1999 at No. CC 199308384 in the Court of Common Pleas of Allegheny County, Pennsylvania. He unsuccessfully sought appellate and post-conviction relief in the state courts.

The instant petition was received in this Court on October 3, 2008. However, this is not the first federal challenge that the petitioner has directed at his state court conviction. Kelly filed a federal habeas corpus petition in this Court at C.A.05-584. That petition was denied on the merits and the United States Court of Appeals for the Third Circuit affirmed the denial of relief

on May 24, 2006 at Docket No. 05-4804.¹ He has now submitted a second petition to this Court.

The Antiterrorism and Effective Death Penalty Act, signed into law on April 24, 1996, included several major reforms to the federal habeas corpus laws. As part of this habeas corpus reform, Congress amended 28 U.S.C. § 2244 to prohibit district courts from entertaining claims presented in a second or successive habeas corpus application unless the appropriate federal court of appeals authorizes such filing. The relevant amended language provides as follows:

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2244(b)(3).

Because it would appear that this Court cannot consider the instant petition without leave of the Court of Appeals, it is recommended that the petition of Richard Kelly for a writ of habeas corpus be transferred to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. 1631.

By October 17, 2008, any party may serve and file written objections to the Report and

¹ See: Petition at p.2.

Recommendation. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

s/Robert C. Mitchell,
United States Magistrate Judge

Entered: October 5, 2008